
In the United States
Court of Appeals
for the Ninth Circuit

CHARLES COX and ALBERT EARL JONES,
vs. Appellants,

AGNES H. REMILLARD, Administratrix
of the Estate of Edward S. Remillard,
Deceased, Appellee.

APPELLANTS' BRIEF

On Appeal from the United States District Court
For the District of Oregon

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Argument II

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- (1) General damages of \$10,000. to the estate of the three year old decedent were excessive and not supported by a sufficiency of the evidence.
- (2) Since the case was tried to the court without a jury the Appellate Court is not prohibited by the Constitution or by any statute from reversing or reducing the judgment.
- (3) Here, there is no dispute as to the evidence on damages and no occasion to judge or weigh the credibility of witnesses. Therefore, this Court is free to draw its own inferences and conclusions as to the proper amount of damages, unrestrained by the "clearly erroneous" test of Rule 52 (a).
- (4) Moreover, an incorrect conclusion or a judgment not supported by substantial evidence is a "clearly erroneous" finding to be corrected on appeal.
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No. 14910

In the United States
Court of Appeals
for the Ninth Circuit

HARLES COX and ALBERT EARL JONES,
vs. Appellants,

GNES H. REMILLARD, Administratrix
of the Estate of Edward S. Remillard,
deceased, Appellee.

APPELLANTS' BRIEF

On Appeal from the United States District Court
For the District of Oregon

JUDGMENT BELOW

The findings of fact, conclusions of law, and judgment
entered by the District Court and the objections to the same
and the order overruling the objections are on pages 10-16
of the transcript of record.

JURISDICTION

The appellee, plaintiff below, is a resident of the State of Oregon and is the administratrix of the estate of Edward S. Remillard, the three year old decedent herein, who at the time of his death was resident of Montana. The appellants and defendants below, are residents of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00. The foregoing facts are admitted in the pre-trial order which superseded the pleadings. (Tr. 6)

The jurisdiction of the District Court is therefore based upon diversity of citizenship under 28 USCA. sec. 1332 and the jurisdiction of this Court upon the appellate powers conferred by 28 USCA, sections 1291, 1294.

STATEMENT OF THE CASE

This is an action based upon the Oregon Wrongful Death Act to recover damages for the death of a three year old boy. (Oregon Revised Statutes, 30.020). Such a child left, of course, no surviving spouse or dependents and the action was therefore brought for the benefit of his estate. (Tr. 7)

The child was killed on December 6, 1954, when the automobile in which he was riding as a passenger was struck from the rear by a tractor and attached semi-trailer owned by appellant Cox and operated by appellant Jones. The

collision happened on U. S. Highway 30 about 11½ miles west of the City of The Dalles, in the State of Oregon. (Tr. 11)

The case was tried by the Honorable Claude McColloch, jury having been waived by the parties. (Tr. 10) The trial resulted in a judgment in favor of the plaintiff-administratrix, in the sum of \$10,000.00 general damages and \$238.00 special damages.

From that judgment and the various findings and conclusions of law by the trial judge the appellants have appealed. The appellants have not appealed from the finding of liability against them. What they are appealing from is the failure of the trial judge to hold the Oregon Wrongful Death Act unenforcible and unconstitutional under the particular facts herein; the action of the trial court in basing the judgment upon speculation; the excessiveness of the general damages awarded and the lack of evidence in support there-

QUESTIONS PRESENTED

As pertinent herein, the Oregon Wrongful Death Act provides that when the death of a person is caused by the wrongful act or omission of another an action therefor may be maintained by the decedent's personal representatives for the "benefit of the estate of the decedent." The act, standing by itself, contains no standard for measuring the damages to be recovered. It merely provides for an action "for the

benefit of the estate" where decedent left no spouse or dependents and sets a limit of \$20,000.00 on the amount of the recovery.

Thus, standing by itself, the Statute would be so vague and indefinite as to be unenforcible and unconstitutional. However, by judicial construction the Oregon Supreme Court has inscribed standards on the Act and given content to what is meant by "benefit of the estate." Under such construction, damages for the "benefit of the estate" is the "pecuniary loss" to the estate which is based upon the probable net savings that the decedent would have accumulated at the termination of his normal life expectancy. Also, under such judicial construction, the "pecuniary loss" to the estate is based upon a number of court-enumerated factors including earning capacity, ability to make money, and evidence of thriftiness and expenditure.

Such factors can provide a standard for the estate of an adult or older child and appellants do not question the constitutionality of the Act as applied in such cases. On the other hand, such factors are non-existent in the case of the three year old decedent in this case and therefore the appellants urge that the Act, without being delimited by judicial standards herein was void for vagueness.

The Oregon Supreme Court has conceded that damages awarded the estate of a seven year old girl would be speculative but the constitutionality of the Act, as so applied, was

not there, nor has it ever been, before our State court for decision.

The constitutionality question thus presented herein is one of first impression.

This case was tried without a jury. There was no conflict to the evidence on damages and all that evidence is now before this Court on review. Thus, if the validity of the Act is upheld, this would then be a proper case for this appellate court to pass upon the excessiveness of the general damages awarded.

Summarized below are the issues on this appeal:

I.

Where the Oregon Wrongful Death Act is vague and indefinite as applied to damages to be awarded thereunder the estate of a three year old boy is such Act unenforcible and void for vagueness?

II.

Where a judgment for general damages is necessarily based on speculation should such judgment be upheld on appeal?

III.

Was the assessment of general damages, in the sum of \$10,000.00 for the benefit of the estate of the three year old

decendent, excessive and not supported by a sufficiency of the evidence?

SPECIFICATIONS OF ERROR

The foregoing questions presented on this appeal are embraced within the following specifications of error:

1. That the District Court erred in not holding unconstitutional, in the present case, the Oregon Wrongful Death Statute (ORS 30.020) under which this action was brought for benefit of the estate of a three year old decedent. (Tr. 44)

Said error consisted of the trial court's failure to hold the Act void for vagueness under the facts of this case. (Tr. 15)

2. That the District Court erred by indulging in speculation in finding and awarding damages herein and in entering its conclusion of law that appellee is entitled to recover judgment against appellants in the sum of \$10,00.00 general damages and \$238.00 special damages. (Tr. 44)

Said error consisted of awarding general damages that were necessarily based on speculation as to what "pecuniary loss" would be sustained by a three year old child many years hence. (Tr. 15)

3. That the District Court erred in finding and awarding damages which were excessive and not supported by a sufficiency of the evidence. (Tr. 45)

Said error consisted of awarding \$10,000.00 general damages to the estate of the three year old decedent which under the evidence, or rather lack of evidence, was excessive. (Tr. 15)

POINTS OF LAW

I.

(1) The Oregon Wrongful Death Act, even as delimited by judicial construction, is so vague and indefinite as to be unenforceable and void in this case and deprived appellants of Due Process when applied to the alleged pecuniary loss sustained by the estate of a three year old child.

Bell v. State Industrial Accident Commission, 157 Or. 653, 74 P. 2d 55;

Fullerton v. Lamm, 177 Or. 655, 163 P. 2d 941, rehearing den., 165 P. 2d 63;

Vinton v. Hoskins, 174 Or. 106, 147 P. 2d 892;

A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233, 45 S. Ct. 295, 69 L. Ed. 589;

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403;

Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

(2) The Oregon Wrongful Death Act, as judicially construed, may be valid as to damages sustained by the estates

of adults but invalid as applied in the instant case to the estate of a three year old child.

Schleiger v. Northern Terminal Co., 43 Or. 4, 72 P. 32

Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, 28
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Norlund v. Lewis & Clark Ry. Co., 141 Or. 83, 15 P.
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Hansen v. Hayes, 175 Or. 358, 379-391, 154 P. 2d 20
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Lane v. Hatfield, 173 Or. 143, P. 2d 230;

The Princess Sophia (D.C.W.D. of Wash.) 35 F.
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den. 288 U. S. 604, 53 S. Ct. 396, 77 L. Ed. 980.

Cases, *supra* Point I (1).

(3) A general statute, such as the Wrongful Death Act, may be invalid when applied to one set of facts and valid when applied to other fact situations.

Dahnke-Walker Milling Co. v. Bondurant, 257 U.
282, 42 S. Ct. 106, 66 L. Ed. 239.

(4) The Federal Court judgment on a state Act where damages were based not on evidence but on speculation arbitrarily deprived appellants of their property without Due Process in violation of the Fifth and Fourteenth Amendments.

12 *Am. Jur.*, 283 et. seq., 313, "Constitutional Law", Secs. 586, 620;

15 *Am. Jur.* 795 et seq. "Damages," Sec. 356;

Oregon-Washington R. & Nav. Co. v. Branham, 9 Cir., 1919, 259 F. 555, 38 A.L.R. 389;

Western Union Telegraph Co. v. Ramsey, 261 Ky. 657, 88 S.W. 2d 675, 103 A.L.R. 541.

SUMMARY OF ARGUMENT

I.

The Oregon Wrongful Death Act provides that in case of wrongful death the personal representative of the decedent may maintain an action against the wrongdoer "for the benefit of the estate of the decedent" and limits the maximum recovery to \$20,000. (ORS 30.020).

The statute itself prescribed no standards for determining the damages to be awarded for "the estate of decedent." A statute, which on its face appears void for vagueness, may be saved from that vice, in some instances, by judicial construction wherein standards are prescribed. In this connection, the Oregon Supreme Court has construed damages for "the benefit of the estate" to be limited to pecuniary loss" to the estate which in turn is measured by a number of criteria including earning capacity, ability to make money, evidence of thriftiness, and evidence of expenditures. The judicial standards thus inscribed on the Act

redeem it from invalidity for vagueness in most cases such as those involving adults. However, in cases involving deceased children of tender years, such as the three year old child herein, the delimitation by judicial construction is not existent because of the lack of evidence of earning capacity, ability to make money, thriftiness and habits of expenditure. In this latter type of case, now before this Court, the Act is so vague as to be void and unenforceable and any damages allowed thereunder must be speculative as the Oregon Supreme Court has already conceded. To enforce such an Act and judgment would deprive appellants of Due Process.

ARGUMENT

The Oregon Wrongful Death Act provides:

I

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained such action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed \$20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased." (ORS 30.020)

The three year old decedent in this case naturally left no surviving spouse or dependents and the action was therefore filed by his personal representative for the benefit of his estate. (Tr. 7)

On its face the Act is vague as to what is meant by damages "for the benefit of the estate of the decedent." In a number of decisions the Oregon Supreme Court has attempted to remedy this vagueness by presenting standards for the damages that might be recovered thereunder. In substance, the Oregon Court has held that such damages do not include any award for pain and suffering of the decedent or for solatium or the grief and anguish of surviving relatives. Further, the Oregon Court has held such damages to be the "pecuniary loss" to the estate and has ruled that such "pecuniary loss" is the net savings decedent would have accumulated in his estate if he had lived out his normal life expectancy. In determining such probable net savings the Oregon Court has held that the trier of facts should consider the decedent's (1) probable length of life; (2) his capacity to labor; (3) his earning capacity and ability to make money; (4) his habits of living and expenditure and (5) his thriftiness. *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 50 28, P. 497; *Hansen v. Hayes*, 175 Or. 358, 379-391, 154 P. 2d 202, 210-215. Damages for pecuniary loss to the estate are to be reduced to present value and in the case of unemancipated minor decedents the pecuniary loss to their estates shall not be deemed to commence until after the time they

would have reached majority if they had lived. *Nordlund v. Lewis & Clark Ry. Co.*, 141 Or. 83, 15 P. 2d 980; *Hansen v. Hayes*, supra; *Schleiger v. Northern Terminal Co.*, 43 Or. 72 P. 324; *Lane v. Hatfield*, 173 Or. 79, 143 P. 2d 230.

The criteria enumerated above for determining "pecuniary loss" to the estate was set down by the Oregon Court with reference to adult decedents. Appellants do not urge that the Act, as delimited by the judicial standards so prescribed on it, would be void for vagueness as applied to adult decedents. But as to a three year old child the judicial standards of damage affixed to the Act cannot save it from being void for vagueness. This is so because such judicial standards, which have meaning and content for an adult or an older child, are totally devoid of meaning, content and application as to a three year old child. Such a child as the one in this case had (1) no capacity to labor; (2) no earning capacity or ability to make money; (3) no habits of living or expenditure and (4) no thriftiness. Thus there is no factual basis upon which to predicate a "pecuniary loss" to the estate. The above contention is borne out by the decision of the Federal District Court for the Western District of Washington in *The Princess Sophia*, supra, 35 F. 2d 100. There the court was applying the same "benefit of estate" rule under the Alaska Wrongful Death Act and ruled that "the damage to the estate would therefore be the value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of the life of the deceased."

2d at 738). The Court also emphasized that the increased costs of living to a widow, love, affection, equal distribution of justice or the dictates of humanity would not warrant the court in finding a pecuniary loss where none was shown by evidence. (35 F. 2d at 740). Further it was held:

"The Court could not in good conscience say that a party 35, 40, 50, or 60 years of age, who has not shown some result of saving and saving habit and position of expectancy, in all reasonable probability would leave an estate of present worth at the end of life expectancy. Health, earning capacity, and employment, contributions to charity or 'living well', being a 'good fellow,' without some evidence of accumulation and saving habit, does not create a presumption of itself to support such finding." (35 F. 2d at 740)

So far as appellants have been able to ascertain there are four reported Oregon cases in which damages have been allowed in a wrongful death action to a personal representative for the benefit of a decedent minor's estate.

However, in none of these cases was the decedent of such tender age as the three year old decedent herein and in none of these cases did the award exceed \$5,000.00 general damages, which would be half that allowed here.

Moreover, in none of these cases did the appellants challenge the vagueness or constitutionality of the Act.

These cases are: *Rekdahl v. Cheney*, 134 Or. 251, 293 P.

412; *Lane v. Hatfield*, 173 Or. 79, 143 P. 2d 230; *Cowgill v. Adm'r v. Boock, Adm'r.* 189 Or. 282, 218 P. 2d 445 and *Schleiger v. Northern Terminal Co.*, 43 Or. 4, 72 P. 324.

In the *Rekdahl* case a jury award of \$2,500. to the estate of a nine year old boy was affirmed.

In the *Lane* case a jury award of \$5,000. to the estate of a seven year old girl was affirmed.

In the *Cowgill* case a jury award of \$5,000. to the estate of a 17 year old boy was affirmed where the boy was killed as the proximate result of his father's wilful misconduct.

In the *Schleiger* case a jury award of \$1,225. to the estate of an 11 year old boy was affirmed.

It is significant to note that in *Lane v. Hatfield*, supra, the Oregon Supreme Court in dealing with the damages to be awarded the estate of a seven year old girl conceded that the standard of awarding damages therein was speculative, vague and uncertain. On this point the Court noted:

"At best, whether determined by a jury, or by the court without a jury there is much speculation attendant upon fixing the amount due to plaintiff."

* * *

"We are also influenced by reason of the speculative nature of appraising the damages in a case of this character." (173 Or. at 88; 143 P. 2d at 234)

* * *

"The rule, that the measure of recovery by a person representative for the wrongful death of his decedent

is the value of the life of such decedent if he had not come to such untimely end, has been termed vague, uncertain and speculative if not conjectural. It is, however, the best that judicial wisdom has been able to formulate." (173 Or. at 89, 143 P. 2d at 234).

It is also significant to note that in *Lane v. Hatfield*, the appellant did not challenge the constitutionality of the Oregon Wrongful Death Act. Therefore, there was no occasion for the Oregon Court to consider the validity of the Act as applied to the assessment of damages to the estate of a young child.

However, in the case at bar, appellants have challenged the constitutionality of the Act as applied to the facts herein. The constitutional principles upon which appellants rely are discussed below:

(1) The Act is so vague and indefinite when applied to damages to be allowed "for the benefit of the estate" of the three year old decedent herein as to be unenforcible and void for vagueness. See cases cited supra Pont I (1).

A statute which is vague and indefinite is unconstitutional whether the statute provides for civil remedies or criminal sanctions. *A. B. Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 45 S. Ct. 295, 69 L. Ed. 589.

Judicial construction can sometimes save a statute from the vice of void for vagueness. *Winters v. New York*, 333

U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840. But any judicial elimination on the vagueness of the Act, as we have seen, does not apply in the case of the three year old decedent herein and the Act is too uncertain to be enforceable in this case and if applied herein would be void for vagueness. *Bell v. State Industrial Accident Commission*, 157 Or. 653, 74 P. 2d 55 and other cases cited supra Point I (1).

In *Bell v. State Industrial Accident Commission*, supra, a provision of the Oregon Workmen's Compensation Act was held inoperative and void for vagueness. That provision allowed the Industrial Accident Commission to recover from an employer the cost to the Commission of a workman's claim for injury received before the employer had filed with the Commission a notice of engaging in a hazardous occupation. The Court held that the standard set up to determine the cost of the claim to the Commission was not sufficiently definite upon which to base a valid judgment against an employer. On this point the Court held,

"In a word, the legislature has enacted a statute which provides for the recovery of an invalid judgment. That statute, so interpreted, is infected with the vice of uncertainty and indefiniteness, and must be pronounced inoperative and void: 1 Lewis' Statutory Construction (2d Ed.) #86." (157 Or. at 661, 74 P. 2d at 58)

Likewise in the case at bar the Oregon Wrongful Death Act and the judicial standards inscribed on it to meas-

damages are inoperative and void as applied to this case of the estate of a three year old child. See other cases cited supra Point 1 (1).

(2) A general statute may be invalid when applied to one set of facts and valid when applied to other situations. *Shenke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 19 S. Ct. 106, 66 L. Ed. 239.

(3) Thus, the Oregon Wrongful Death Act, as judicially interpreted, may be valid as to damages sustained by estates of adults or older minors because the standards embodied on it are there applicable but invalid in the instant case because those standards are non-existent in the case of the estate of the three year old child herein. See cases supra Point I (2) and especially *The Princess Sophia* (D.C.W.D. Wash.) supra, 35 F. 2d 736.

(4) A Federal Court judgment, premised on a state statute wherein the damages awarded are based not on evidence but on speculation, arbitrarily deprived appellants their property without Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The requirements of due process are binding on both Federal and State governments and cover the exercise of both legislative and judicial functions. As will presently be shown in the next section of this Brief, the judgment herein for \$10,000.00 general damages was necessarily based

on speculation and not on evidence. Such a judgment by a Federal court and based on a State Statute violates the Due Process guaranteed by the Fifth and Fourteenth Amendments. See cases and authorities *supra* Point I (4). *Oregon-Washington R. & Nav. Co. v. Branham*, 9 Cir., 1919, 259 F. 555, 557, 38 A.L.R. 389, this Court approved the basic principle that "Where actual pecuniary damages are sought, some evidence must be given, showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own." See also *Western Union Telegraph Co. v. Ramsey*, 261 Ky. 657, 88 S.W. 2d 675, 1 A.L.R. 541.

POINTS OF LAW

II

(1) A judgment based on speculation cannot stand on review.

Oregon-Washington R. & Nav. Co. v. Branham, 9 Cir. 1919, 259 F. 555, 38 A.L.R. 389;

The Princess Sophia, (D.C.W.D. of Wash.), 35 F. 736; 36 F. 2d 591; 9 Cir., 1932, 61 F. 2d 339, cert. den. 288 U. S. 605; 53 S. Ct. 396, 77 L. Ed. 980.

(2) The trial court erred in computing \$10,000. general damages by using an award of \$5,000.00 approved in a case decided 12 years before and then adding thereto 50%

ount of difference in sex and 50% for difference in value money.

Memorandum of Decision, (Tr. 10)

Lane v. Hatfield, 173 Or. 79, 143 P. 2d 230

SUMMARY OF ARGUMENT

II

The trial judge's award of \$10,000. general damages for estate of the three year old decedent was necessarily based on speculation and not on evidence or any factual criteria. Such a judgment should not be affirmed on review.

ARGUMENT

II

All the evidence on damages has been brought up on this appeal. There is no conflict on that evidence. It can all be reviewed by this Court in a matter of minutes as it is set forth in the written transcript of record.

The lack of evidence herein on damages was not the result of any lack of diligence or ability on the part of counsel for the appellee. On the contrary, the lack evidence proved "pecuniary loss" to the estate of the three year old child arose from the inherent nature of the case.

In essence, the only evidence offered to prove “pecuniary loss” to the decedent’s estate was that decedent was a healthy, bright, alert, normal boy of three years of age, who played well with other children.

Upon the conclusion of the trial, the judge according to the memorandum of decision that he entered, appeared to be at a loss as to what amount of general damages to assess. What he did in arriving at a figure of \$10,000.00 was to take, as the starting point, the sum of \$5,000. which was the sum awarded the estate of a seven year old girl in the case of *Lane v. Hatfield*, 173 Or. 79, 143 P. 2d 230 (1943), decided some 12 years before by the Oregon Supreme Court. To this figure of \$5,000.00 picked out from the *Lane* case, the trial judge added 50% because of a difference of sex and another 50% for the difference in the value of money between 1943 and 1955, or a total of \$10,000.00.

The trial judge’s Memorandum of Decision is printed verbatim, below:

“In *Lane v Hatfield* (1943) the Oregon Supreme Court approved a judgment of \$5,000.00 in the case of a seven-year-old girl. I have arrived at the amount allowed here by adding 50% on account of the difference in sex and 50% difference in value of money, to \$5,000.00.” (Tr. 10)

As previously noted, there was no evidence on a number of the essential criteria laid down by our Supreme Court

termining "pecuniary loss" to the estate. There was evidence of the decedent's age, his life expectancy and that he was healthy, alert and normal. This evidence would not provide a factual basis for saying that \$10,000 was the present value of the net estate he would have accumulated had he lived out his life.

There was no evidence on such essential factors as earning capacity, ability to make money, expenditures and thriftiness and thus the judgment for \$10,000. was necessarily based on speculation. *The Princess Sophia*, supra (D.C.-D. of Wash.), 35 F. 2d 736; *Lane v. Hatfield*, 173 Or. 143 P. 2d 230; *Oregon-Washington R & Nav. Co. v. Elkhart*, 9 Cir., 1919, 259 F. 555, 38 A.L.R. 389.

POINTS OF LAW

III

(1) General damages of \$10,000. to the estate of the three year old decedent were excessive and not supported by sufficiency of the evidence.

Rekdahl v. Cheney, 134 Or. 251, 293 P. 412;

Lane v. Hatfield, 173 Or. 79, 143 P. 2d 230;

Cowgill Adm'r v. Boock, Adm'r. 189 Or. 282, 218 P. 2d 445;

Schleiger v. Northern Terminal Co., 43 Or. 4, 72 P. 324;

United States v. Guyer, 4 Cir., 1954, 218 F. 2d 266.

(2) Since the case was tried to the court without a jury, the Appellate Court is not prohibited by the Constitution or by any statute from reversing or reducing the judgment.

United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746;

See also: *Wakefield Co. v. Sherman, Clay & Co.*, 141 F. 2d 270, 17 P. 2d 319.

(3) Here, there is no dispute as to the evidence on damages and no occasion to judge or weigh the credibility of the witnesses. Therefore, this Court is free to draw its own inferences and conclusions as to the proper amount of damages, unrestrained by the "clearly erroneous" test of Rule 52 (a).

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1949, 119 F. 2d 704;

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 1949, 178 F. 2d 541;

Hardt v. Heller Bros. Co., 3 Cir. 1948, 171 F. 2d 606;
Sears, Roebuck & Co. v. Johnson, 3 Cir., 1955, 219 F. 2d 590;

Aetna Casualty & Surety Co. v. De Maison, 3 Cir., 1948, 213 F. 2d 826;

Orvis v. Higgins, 2 Cir., 1950, 180 F. 2d 537, cert. denied, 340 U. S. 810, 71 S. Ct. 37, 95 L. Ed. 595;

Home Indemnity Co. of New York v. Standard Accident Co., 9 Cir., 1948, 167 F. 2d 919.

(4) Moreover, an incorrect conclusion or a judgment not supported by substantial evidence is a "clearly erroneous" finding to be corrected on appeal.

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1941, 119 F. 2d 704;

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 1949, 178 F. 2d 541;

Magidson v. Duggan, 8 Cir., 1954, 212 F. 2d 748; cert. den. 348 U. S. 883, 75 S. Ct. 124, 99 L. Ed. 78.

(5) Furthermore, a finding is "clearly erroneous" although there is evidence to support it when the appellate court, on the entire evidence, is left with a definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746;

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 1949, 178 F. 2d 897;

Gindorff v. Prince, 2 Cir., 1951, 189 F. 2d 897;

Hardt v. Heller Bros. Co., 3 Cir., 1948, 171 F. 2d 644.

(6) Where damages awarded by the trial judge are in excess of the amount justified by the evidence the Court of appeals has the right and duty to make its own determination of the proper damages, if any, on the evidence in the record if that can reasonably be done.

United States v. Guyer, 4 Cir., 1954, 218 F. 2d 266;

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1948, 119 F. 2d 704;

Hardt v. Heller Bros. Co., 3 Cir., 1948, 171 F. 2d 644

SUMMARY OF ARGUMENT

III

In the preceding sections of this Brief, appellants have set forth what they believe are cogent reasons for reversing the judgment and dismissing the action herein, except as to the special damages allowed, because the Oregon Wrongful Death Act as applied herein was void for vagueness because the award of \$10,000. general damage was necessarily based on speculation.

Proceeding further we now come to the proposition that in any event, the judgment for \$10,000. general damage was excessive and not supported by substantial evidence. This case was tried to the court without a jury. Therefore this appeal this Court is not barred by the Seventh Amendment to the Constitution or by any statute from reversing, or reducing the judgment for excessiveness.

Also, in reviewing the judgment this Court is not limited by the "clearly erroneous" test of Rule 52 (a) because here there was no conflict as to the evidence on general damages and no occasion to weigh the credibility of witnesses on conflicting testimony. Furthermore, any incorrect conclusions

to the amount of general damages or a judgment not supported by substantial evidence is a "clearly erroneous" finding to be corrected on appeal. In addition, a finding is "clearly erroneous" even if there is evidence to support it when the reviewing court, on the entire record, is left with a definite and firm conviction that a mistake has been made. In the case at bar all the evidence pertaining to the damages alleged is before this Court on appeal. In such a case where the damages assessed below are in excess of the amount justified by the evidence the Court of Appeals has the right to determine the proper amount of damages, if any, to be allowed.

ARGUMENT

III

As previously seen, the \$10,000. award herein was twice as large as the largest amount ever awarded to the estate of a minor in any prior reported Oregon case. Added to that is the fact that in none of these prior cases was the minor of such a tender age. We have also pointed to the lack of evidence to show the "pecuniary loss" to the estate of the child in this case. Furthermore, an examination by this Court of the sparse transcript of record will readily demonstrate the insufficiency of the evidence adduced to support the judgment.

There is no conflict on the evidence of alleged damages and therefore this is not a case where the trial judge would

be in a better position than the appellate court to weigh evidence or judge the credibility of the witnesses. Thus, the Court is free to draw its own inferences and conclusions as to the proper amount of damages unrestrained by the "clearly erroneous" test of Rule 52 (a). Nor is there any constitutional or statutory prohibition to prevent this Court from reversing or reducing the judgment. These principles are well established in a number of cases, some of which will now be discussed.

United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746, was a civil action to restrain violations of the Sherman Act. The trial court's action in dismissing the complaint and entering findings in favor of the defendants was reversed by the United States Supreme Court. This case is often quoted for its interpretation of the "clearly erroneous" test of Rule 52 (a), which will be referred to later in this Brief, and is likewise often cited for the distinction to be made on appeal between jury and non-jury cases. On this latter point the Supreme Court emphasized:

"Since judicial review of findings of trial courts does not have the statutory or constitutional limitations which govern judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact in a trial court where 'clearly erroneous' " (333 U.S. 395)

It is also the rule under State appellate practice in Oregon that the Oregon Supreme Court is unrestrained by State C

tutional or statutory provisions in reversing or reducing money judgment of the trial court sitting without a jury. *Wakefield Co. v. Sherman, Clay & Co.*, 141 Or. 270, 17 P. 319.

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1941, 9 F. 2d 704, was an action in quantum meruit by a tax attorney to recover compensation for services rendered the defendant. The case was tried without a jury and plaintiff was allowed \$8,500. as reasonable compensation plus non-disputed expense items of \$326.65. The question on appeal was whether the trial judge had erred in fixing appellee's compensation at \$8,500. The third Circuit held the award of \$8,500. to be excessive and reduced it to \$2,500. There was conflicting testimony by witnesses for the respective parties as to the reasonable worth of the services, witnesses for the plaintiff having estimated the worth of the services at \$5,000. and \$30,000. while defendant's witnesses estimated the value of the services at \$1,500. and \$2,000.

In reversing the trial court and reducing the general award from \$8,500. to \$2,500., the appellate court noted that Rule 52 (a) does not entrench with the "clearly erroneous" standard "the inferences and conclusions drawn by the trial court from its fact findings." (119 F. 2d at 705). Further, that the appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. (119 F. 2d at 706) The Court also held that . . . The sufficiency of the evidence to sustain a trial court's

conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration . . . An incorrect conclusion by a trial court qualifies as a 'clearly erroneous finding, for the correction whereof on appeal Rule 52 specifically provides.' (119 F. 2d at 706)

The case at bar is a stronger instance for the reversal or reduction of the trial court's general award because unlike the *Kuhn* case there is no conflict of testimony herein as to the alleged damages and all that remains is the bare drawing of an inference or conclusion as to the ultimate fact of the amount of the award, if any.

The *Kuhn* decision has been cited and relied upon in numerous cases. See for example: *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 9 Cir., 1949, 178 F. 2d 541; *Hardt v. Heller Bros. Co.*, 3 Cir., 1948, 171 F. 2d 644.

In *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, supra, this Court quoted with approval from the *Kuhn* case to the effect that Rule 52 (a) does not operate "to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings." This Court also held that an appellate court may draw its own inferences from undisputed facts. (178 F. 2d at 548)

As in the *Kuhn* case the sole question on appeal in *Hardt v. Heller Bros. Co.*, supra, was the alleged excessiveness of the trial judge's award in quantum meruit for services rendered.

ed. There the appellate court held that the award of \$5,000. was excessive and that, on the entire evidence, \$5,000. would be ample compensation and the judgment was accordingly reduced on appeal.

For additional cases holding that the "clearly erroneous" test does not apply where there is no dispute as to basic facts and the question is what inference, conclusion or ultimate fact should be drawn see: *Sears Roebuck & Co. v. Johnson*, 3 Cir., 1955, 219 F. 2d 590; *Aetna Casualty & Surety Co. v. Le Maison*, 3 Cir., 1954, 213 F. 2d 826; *Home Indemnity Co. v. New York v. Standard Acc. Ins. Co.*, 9 Cir., 1948, 167 F. 919.

The Second Circuit in *Orvis v. Higgins*, 2 Cir., 1950, 180 F. 2d 537, supra, in discussing the effect of a case tried without a jury held:

"It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding. So in the instant case, perhaps, on the record evidence, we might have affirmed a jury's verdict or an administrative agency's finding in plaintiff's favor. That, however, we need not decide. For here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant." (180 F. 2d at 540)

If despite the foregoing cases, it should be felt that "clearly erroneous" test of Rule 52 (a) is applicable here then it is submitted that from the record now before the Court the trial judge's finding or conclusion on general damages is "clearly erroneous." This is so because a judgment not supported by substantial evidence is clearly erroneous and should be corrected on appeal. See *Point* (4) *supra*. This is also so because a finding is "clearly erroneous" even if there is evidence to support it when the appellate court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. See cases cited *supra* *Point* III (5). The language of this principle was set forth in *United States v. United States Gypsum Co.* *supra*, 333 U. S. 364, 395, in the following form, and has been repeated with approval in many subsequent cases:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In preceding sections of this Brief we have tried to point out that the trial court erred in awarding any general damages herein. We now proceed to the situation where the appellate court may feel that some general damages should have been awarded but that the damages set by the trial judge were in excess of the amount justified by the evidence. In this latter type of situation the reviewing court should

make its own ultimate finding on the amount of damages properly allowable where on evidence in the record this can reasonably be done. The appellate court is free to draw its own inferences, conclusions and determination of ultimate facts and should do so where the case was tried, without a jury; and the evaluation of credibility is non-existent or unimportant; and there is no conflict as to basic facts; and all the evidence on alleged damages is before the court for review.

Appellate courts have recognized this method of review in a number of cases including *United States v. Guyer*, 4 Cir., 1954, 218 F. 2d 266; *Kuhn v. Princess Lida of Thurn & Taxis*, 3 Cir., 1941, 119 F. 2d 704 and *Hardt v. Heller Bros.*, 3 Cir., 1948, 171 F. 2d 644.

United States v. Guyer, supra, involved a number of actions tried to the court without a jury under the Federal Tort Claims Act to recover for injuries and wrongful deaths caused by the crash of a government airplane into a home. On appeal, the Fourth Circuit held that when a finding as to damages was clearly erroneous because in excess of any amount justified by the evidence it was the duty of the appellate court to "make a finding ourselves on the evidence in the record if this can reasonably be done." (219 F. 2d at 258). The Court then went on to affirm some of the judgments for damages and also reduced some of the judgments. Among the judgments materially reduced were those awarding \$8,000. to parents for the loss of services resulting from

the death of a daughter 6½ years old and a similar amount of \$8,000. for the loss of services resulting from the death of a second daughter, age 8 weeks. Such awards were held excessive and were reduced to \$5,000. each. Another judgment was held excessive and reduced from \$30,000 to \$15,000. for injuries sustained by a woman occupant of a home struck by the ill-fated plane.

As we previously saw the Circuit Court materially reduced judgments in *Kuhn v. Princess Lida of Thurn & Taxis*, supra, from \$8,500. to \$2,500. and in *Hardt v. Heller E. Co.*, supra, from \$45,000. to \$15,000. In *Gindorff v. Princess Lida of Thurn & Taxis*, 2 Cir., 1951, 189 F. 2d 897, the Second Circuit went further and set aside the trial court's judgment for \$38,500. and dismissed the action because the reviewing court felt that the trial judge, on the entire evidence, had committed a mistake.

It is respectfully submitted that the trial judge erred in allowing a judgment herein for \$10,000. for alleged "pecuniary loss" to the estate of the three year old decedent. The appellants have shown in this Brief. However, if it be held that some general damages should be allowed then the sum of \$10,000. is in excess of the amount justified by the evidence and should be materially reduced.

CONCLUSION

The Oregon Wrongful Death Act, shorn of standards by which to assess the alleged "pecuniary loss" to the es-

the three year old decedent herein, was too indefinite to be enforceable and was void for vagueness under the particular facts of this case.

The appellants, who were defendants in the trial court, are entitled to have this case (including the amount of damages) decided on its own merits and on the evidence therein adduced.

Instead, the trial judge reached back to a different case decided 12 years before; took the \$5,000. sum awarded in that case and added thereto 50% for difference in sex and 50% for difference in value of money, or a total of \$10,000., and thus decided the general damages allowed against appellants in this case. Such a judgment was arbitrary and was based on speculation and not on the evidence introduced in this trial.

Regretfully, the law allows nothing for solatium or the grief and anguish of parents caused by the death of a child. On the other hand, "pecuniary loss" in this case to the estate of the three year old child could not factually be proved.

For the foregoing reasons that part of the judgment allowing general damages to the estate of the child should be set aside. If the contrary be held by this Court, then it is submitted that the judgment of the trial judge for \$10,000. in general damages was excessive and beyond the amount justified by the evidence.

The evidence on damages is not in conflict and it all here before the reviewing court. Under such circumstances, this Court has the power and right to determine itself, the proper amount of damages, if any, that should be allowed herein.

Respectfully submitted,

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